Supreme Court, U.S.
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No.

In the

SUPREME COURT OF THE UNITED STATES

JULIE HARDY, Individually and as the Representative of the ESTATE OF STEPHEN HARDY and on Behalf of and as Next of Friend to KIRSTY LEANNE HARDY, LAURA STACEY HARDY, and BEN DEREK HARDY, Who Also Sue Individually and on Behalf of Any Other Proper Legal Beneficiaries of Stephen Hardy,

Petitioners.

versus

MICHAEL TESTA, individually, and the LAW FIRM OF TESTA AND TESTA, Intervenors

Respondents,

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WAS IT ERROR AND A DENIAL OF DUE PROCESS TO RENDER JUDGMENT SOLELY ON THE BASIS OF CONTRACT RATIFICATION, WHERE THE PARTIES WERE COLLATERALLY ESTOPPED FROM RAISING CONTRACT RATIFICATION BY A PREVIOUS ORDER OF THE DISTRICT COURT, WHICH ORDER EXPRESSLY SET ASIDE ALL SETTLEMENTS, INCLUDING THE STIPULATION THAT SERVED AS THE BASIS FOR THE FINDING OF CONTRACT RATIFICATION?

II. WAS IT ERROR AND A DENIAL OF DUE PROCESS TO RENDER JUDGMENT SOLELY ON THE BASIS OF CONTRACT RATIFICATION, WHERE THE ISSUE OF CONTRACT RATIFICATION WAS NOT PLED OR OTHERWISE RAISED PRIOR TO TRIAL?

III. WAS IT A DENIAL OF DUE PROCESS TO PLACE A COMPLEX CASE INVOLVING A FIFTY VOLUME RECORD, A FIVE DAY TRIAL, AND A $966,667 AMOUNT IN CONTROVERSY ON THE APPELLATE COURT'S SUMMARY DOCKET, AND TO SUMMARILY AFFIRM THE DECISION OF THE DISTRICT COURT IN A TWO PAGE DECISION THAT SETS FORTH AN ERRONEOUS RECITATION OF THE FACTS?

PARTIES TO THE PROCEEDING

Julie Hardy, Individually and on behalf of her three minor children – Claimants/Petitioners

Law Offices of Robert B. Keaty – Not a formal party of record; seeking recovery through the claim of petitioners by virtue of a contingency fee contract with petitioners

Michael Testa, Esq., Individually – Intervenor/Respondent

Law Firm of Testa and Testa – Intervenor/Respondent

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OPINIONS BELOW

The January 26, 2000 opinion of the United States Court of Appeals for the Fifth Circuit in this case is unreported and is set forth in the Appendix hereto (App. 1a).

The April 15, 1999 Order and Reasons of the District Court for the Eastern District of Louisiana in this case is unreported and is set forth in the Appendix hereto (App. 8a).

The March 28, 1995 Order of the District Court for the Eastern District of Louisiana in *In re: Malmac* is unreported and is set forth in the Appendix hereto (App. 24a).

BASIS FOR JURISDICTION

The final judgment of the United States Court of Appeals for the Fifth Circuit affirming the decision of the District Court for the Eastern District of Louisiana was entered on January 26, 2000. Petitioner filed a petition for rehearing on February 9, 2000. Petitioner's petition for rehearing was denied February 22, 2000. This petition for writ of certiori was filed within ninety days from the denial of Petitioner's petition for rehearing. 28 U.S.C. § 2101(c).

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V:

> No person . . . shall be deprived of life, liberty, or property without due process of law . . .

Federal Rule of Civil Procedure 16(e):

> After any conference held pursuant to this rule, an order shall be entered reciting the action taken. This order shall control the subsequent course of the action unless modified by a subsequent order. The order following a final pretrial conference shall be modified only to prevent manifest injustice.

Federal Rule of Civil Procedure 8:

> (a) Claims for Relief. A pleading which sets forth a claim for relief . . . shall contain: . . . (2) a short and plain statement of the claim showing that the pleader is entitled to the relief . . .
>
> (c) Affirmative Defenses. In pleading to a preceding pleading, a party shall set forth affirmatively . . . estoppel, . . . release, res

judicata, . . . waiver, and any other matter constituting an avoidance or affirmative defense.

STATEMENT OF THE CASE

On August 15, 1991, commercial diver Stephen Hardy died when the derrick barge DB-29 sank in the South China Sea. Decedent was survived by his spouse, Julie Hardy, and the three minor children of their marriage (collectively, "Hardy"); by his former spouse, Ann Hardy, and the two children of their marriage (collectively, "Ann Hardy"); and by his parents. All of decedent's survivors were residents of England.

On August 15, 1991, McDermott and other owners of the DB-29 barge filed a limitation proceeding in the United States District Court for the Eastern District of Louisiana. On August 27, 1991, Hardy retained Intervenor/Respondents Michael Testa, Esq. and the Law Firm of Testa & Testa (collectively, "Testa") to represent her and her children in the limitation proceeding. Testa represented Hardy in the limitation proceeding from August 1991 until November 8, 1992, when Hardy discharged Testa for good cause.

The District Court found that Hardy had good cause to discharge Testa, (App. 14a) and this finding was not appealed. The District Court's finding was based on overwhelming proof of Testa's misconduct in representing Hardy. (See App. 10a-14a) Some of the details of Testa's conduct are important to Hardy's petition for writ of certiorari. In particular, the record shows that Testa permitted Hardy to enter

unenforceable settlement agreements, and then failed to inform Hardy of the problems with the agreements. These facts are crucial to a proper understanding of Hardy's petition for writ of certiorari, because the decisions below are based solely on a stipulation that Hardy entered in February 1993 at a time when she could not have known – as a result of Testa's failure to notify her – that her settlement agreement was unenforceable. Additionally, it is important to note that under controlling jurisprudence, petitioner is unaware of a single case in which an attorney who was discharged for good cause was awarded the entire amount of a *quantum meruit* claim for recovery of attorney fees, or even a large proportion thereof.

During the fifteen month period in which Testa represented Hardy, he propounded no discovery, noticed no depositions, produced no expert reports, and filed no motions. Although Testa had done an insignificant amount of work on Hardy's complex case, on May 18, 1992, he approved and permitted Hardy to sign a receipt and release settling her claims and those of her children for $2.9 million (" May 1992 settlement"). The May 1992 settlement had two irreconcilable problems: (1) it did not identify decedent's other survivors, i.e. Ann Hardy and decedent's parents; and (2) it contained an indemnity provision in which Hardy warranted that she was the sole party entitled to assert claims, and in which she agreed to defend and indemnify McDermott from any claims asserted based on the death of decedent. The record contains overwhelming evidence that although Testa knew about Ann Hardy and her children at the

time of the May 1992 settlement, he did not disclose their existence to McDermott. (see App. 11a)

In May 1992, Testa engaged British counsel, who advised that in order to obtain British High Court approval of the May 1992 Settlement, Testa would have to either (1) obtain approval from Ann Hardy; or (2) notice Ann Hardy in the proceeding in the British court. However, neither Testa nor English counsel pursued the filing of anything in the British courts regarding Testa's May 1992 Settlement Agreement. From May to October, 1992, Hardy received no settlement money, and was unable to obtain an explanation from Testa.

On October 13 1992, Testa approved and advised Hardy to execute a second settlement agreement for $2.9 million ("October 1992 settlement"). The October 1992 settlement was conditioned on obtaining British High Court approval. This settlement, like the first, would ultimately prove unenforceable because it did not protect Hardy from claims that might be made by Ann Hardy and decedent's parents. In a March 28, 1995 order, the District Court later noted that "the [October 1992] settlement was so flawed that an application for approval [by the British High Court] could not be made." (App. 35a).

On October 13, 1992, the District Court provisionally approved that October 1992 settlement pending the parties securing the approval of the British High Court. (see App. 26a)

On October 14, 1992, Testa paid Hardy $391,000.00, which represented Hardy's share of a $750,000 partial settlement distribution. After Hardy

returned to England following the October 1992 settlement, Testa refused to take her calls, and she did not receive additional settlement funds. Then, on October 26, 1992, Hardy received a brief letter from Testa which stated: "Enclosed please find a simple release for Anne and her two children to sign. Please have it witnessed by three people and/or notarized and return to our office."

Enclosed with the letter was an unexecuted agreement in which Ann Hardy and her children released all claims against Hardy. The release contained four blank spaces for insertion of the amounts of consideration, as well as signature lines for Ann Hardy's minor children. The District Court noted that the "consideration for the release was left blank, presumably so that Julie Hardy could negotiate on her own behalf with her deceased husband's first wife." (App. 12a) The District Court also noted the following testimony of Hardy concerning Hardy's state of mind following this turn of events: "Julie Hardy was never under the impression that any portion of the 2.9 million dollars to which she had agreed was to be given to Ann Hardy or her two children and was dismayed when it appeared that she was being asked to do so." (App. 12a)

Hardy discharged Testa on November 8, 1992. On November 12, 1992, Testa intervened in the limitation proceeding, seeking to recover one-third of the October 1992 settlement, or $966,666.67, pursuant to a contingency fee contract with Hardy.

On January 15, 1993, Keaty enrolled as counsel of record for Hardy. On February 26, 1993, the

interested parties appeared before the District Court and entered into a stipulation clarifying certain terms of the October 1992 settlement. (App. 40a). The February 1993 stipulation provided: (1) the $2.9 million October 1992 Settlement would be disbursed $1,370,944.08 to Hardy and her children and $779,055.92 to Testa; (2) $2,150,000 in undisbursed settlement funds would be deposited into the registry of the court; (3) Hardy was not indemnifying Ann Hardy or decedent's parents. (App. at 40a-41a). As will be discussed in detail below, the February 1993 stipulation ultimately served as the sole basis for awarding attorney fees to Testa, despite the fact that the stipulation was later set aside by a March 26, 1995 order of the District Court.

At this point, all concerned expected that the British High Court would approve the October 1992 settlement. Consistent with this expectation, on March 1, 1993, Testa's intervention was dismissed as moot. However, Testa refiled his intervention complaint in June 1993 (App. 43a), after an issue developed as to whether the October 1992 settlement would be approved by the British High Court.

On October 21, 1994, the British High Court held that if Hardy made application for approval of the October 1992 settlement, it would not be granted. The High Court held, "No agreement would be approved unless it provided for the children of Anne Hardy and for such of the deceased dependants who are sui juris that had not been disclaimed." The High Court's decision was upheld by the British courts of appeal.

On March 28, 1995, the District Court set aside the October 13, 1992 settlement "for the reason that the suspensive condition requiring High Court approval could not be fulfilled . . . ." (App. 25a). The District Court ruled that "the suspensive condition of High Court approval pertains to the settlement as a whole . . . Failure of the condition thus renders the entire agreement unenforceable. . . . *[T]he attempted settlement of all claims . . . is hereby SET ASIDE.*" (App. 38a; emphasis added; capitalization original). The District Court stated that the February 1993 Conditional Stipulation was an extension and clarification of the October 1992 settlement. (App. 26a) In dismissing Testa's contention that Hardy had delayed seeking High Court approval, the District Court stated: "The dictates of good faith did not place Julie Hardy and her counsel under an obligation to present to the English High Court a patently flawed and potentially improper application for approval. Despite Hardy's extensive inquiry at some expense into the possibility of High Court approval, the suspensive condition could not be fulfilled, rendering the settlement unenforceable." (App. 35a; underlining original).

With the attempted settlements set aside, Hardy was able to proceed with her claim against McDermott, and Testa was able to proceed with his intervention claim for *quantum meruit* recovery of attorney fees. At no time prior to the trial of his intervention claim did Testa plead or otherwise raise the issue of ratification or any similar legal theory.

In December 1995, after Keaty had worked extensively and effectively on Hardy's case for over three years, Keaty perfected a settlement in favor of Hardy that was about 39 percent higher than Testa's October 1992 settlement. Hardy received her settlement funds in full. The amount of $966,666.67 was placed in the registry of the court pending an outcome on the trial of Testa's intervention for *quantum meruit* recovery of attorney fees.

Trial on Testa's claim for *quantum meruit* apportionment of attorney fees was held on April 22, 23, 24, and 27 and May 18, 1998 before Magistrate Judge Alma L. Chasez. At the commencement of trial, there was no question that the issues before the court were: (1) whether or not the discharge of Testa was with cause; and (2) if so, what, if any, fees Testa was entitled to receive. (App. 8a) Consistent with these issues, Keaty presented a convincing showing that Testa was dismissed for good cause. Keaty also presented a convincing showing that by participating thoroughly in discovery and by hiring experts, he succeeded in obtaining a greatly enhanced settlement for Hardy. In contrast, Testa did not produce billing records, a file, or other evidence in support of his burden of proving entitlement to a *quantum meruit* apportionment of attorney fees. (App. 14a).

At trial, Testa introduced the February 1993 stipulation over the objection of Hardy. The Court overruled Hardy's objection on grounds that the February 1993 stipulation was relevant to the quality of Testa's services. (April 24, 1998 Transcript, pp. 121-122)

During the five day trial, Testa elicited roughly three pages of testimony concerning the February 1993 stipulation. On one occasion during trial, counsel for Testa uttered the word "ratification," but it cannot be credibly contended that ratification was at issue during the trial.

After the trial, ratification, an issue that had never been raised prior to trial, eventually assumed paramount importance. Testa first raised the issue of ratification in a June 18, 1998 post-trial brief. After devoting thirty pages to arguing that he was not discharged for cause, Testa devoted the last four pages of his brief to the issue of ratification. On July 6, 1998, Testa filed a rebuttal to Hardy's post-trial brief in which he devoted eighteen pages to the issue of ratification.

Hardy did not respond to Testa's arguments concerning ratification. On December 22, 1998, the District Court issued a minute entry ordering Hardy to file a post-trial memorandum on ratification. On January 25, 1999, some eight months after the conclusion of trial, Hardy addressed the issue of ratification for the first time. Hardy argued among other things that ratification was not properly pled under Fed. Rule Civ. Pro. 8, and that reliance on a settlement stipulation was contrary to Federal Rule of Evidence 408.

On February 8, 1999, Testa submitted a seven page response to Hardy's position on ratification. On February 18, 1999, Hardy filed a rebuttal memorandum pointing out nine material facts that she could not have known at the time of the February 1993 stipulation.

On April 15, 1999, the District Court issued an Order and Reasons finding that Testa was discharged for good cause, but nonetheless awarding all of the attorney fees in dispute to Testa. (App. 8a-23a). The award was based entirely on the Court's conclusion that Hardy ratified her contract with Testa by entering into the February 1993 stipulation.(App. 16a-23a). In essence, the District Court concluded that although all other effects of the October 1992 settlement and February 1993 stipulation were set aside by the District Court's March 28, 1995 order, Hardy's stipulation that Testa was to be paid a sum certain not only remained in effect, but was dispositive of Testa's attorney fee recovery. (App. 22a).

Hardy timely appealed to the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit placed the case on the Court's Summary Docket. On January 26, 2000, the Fifth Circuit issued a two page decision summarily affirming the judgment of the District Court. (App. 1a-3a). Hardy filed a petition for panel rehearing, pointing out that the two page decision recited several critical factual errors. On February 22, 2000, the Fifth Circuit denied Hardy's petition for panel rehearing. (App. 6a-7a).

Hardy has duly filed her petition for writ of certiorari within 90 days of entry of the denial of her petition for rehearing.

REASONS FOR GRANTING THE WRIT

I. IT WAS IT ERROR AND A DENIAL OF DUE PROCESS TO RENDER JUDGMENT SOLELY ON THE BASIS OF CONTRACT RATIFICATION, WHERE THE PARTIES WERE COLLATERALLY ESTOPPED FROM RAISING CONTRACT RATIFICATION BY A PREVIOUS ORDER OF THE DISTRICT COURT

In rendering judgment based solely on the issue of contract ratification, the Courts have ignored a prima facie application of the doctrine of collateral estoppel. Collateral estoppel precludes relitigation of issues actually litigated and necessary to the outcome of a prior action. *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 372, fn. 5, 99 S.Ct. 645, 649, 58 L.Ed.2d 552 (1979). Collateral estoppel has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation. *Id.*, 439 U.S. at 326, citing *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 238-239, 91 S.Ct. 1434, 28 L.Ed.2d 788, 169 USPQ 513 (1971).

On March 28, 1995, the District Court set aside all attempted settlements in Hardy's limitation claim, (App. 38a) thereby paving the way for Testa to pursue his intervention for attorney fees on a *quantum meruit* basis. Four years later, after a lengthy and costly intervention proceeding – including a five day trial on

quantum meruit recovery of attorney fees – the District Court concluded that Hardy had ratified her contract with Testa via her February 1993 stipulation. (App. 16a-23a). As will be discussed in Section II, infra, the issue of ratification had not been pled prior to trial. In seizing on the issue of contract ratification as the sole basis for awarding fees to Testa, the District Court ignored the fact that the parties had already litigated the issue, and that the resolution of the issue had been necessary in order for Testa to proceed forward with his intervention claim for *quantum meruit* recovery of attorney fees. By ignoring the collateral estoppel effect of the District Court's March 28, 1995 order, the Courts deprived Hardy of due process.

On March 28, 1995, District Court Judge Charles Schwartz, Jr. issued an order setting aside the October 1992 settlement "for the reason that the suspensive condition requiring High Court approval could not be fulfilled . . . ." (App. 25a). With regard to the February 1993 stipulation, the order stated simply, "On February 26, 1993, the parties appeared before the Court and entered into a Stipulation clarifying certain terms of the October 13, 1992 settlement and providing for deposit into the Registry of Court of undisbursed settlement funds." (App. 26a, fn 2). The District Court also held that "the suspensive condition of High Court approval pertains to the settlement *as a whole* . . . Failure of the condition thus renders the *entire* agreement unenforceable. . . . *[T]he attempted settlement of all claims set forth in the subject "Receipt and Release of All*

Claims and Indemnity Agreement and Assignment' of October 13, 1992 is hereby SET ASIDE." (App. 38a).

In the absence of an express statement to the contrary, the District Court's March 28, 1995 order surely intended to include Testa's claim for attorney fees within the meaning of "all claims." However, despite the broad language of the District Court's order setting aside "all claims," the Courts have in effect held that the District Court's March 28, 1995 order carved out an unwritten exception allowing Testa to recover fees strictly in accordance with the terms of the February 1993 stipulation. From a legal and due process standpoint, it is difficult to appreciate how the District Court could set aside Hardy's settlement agreement in its March 28, 1995 order, and then four years later rely on a certain component of that settlement as the sole basis for awarding attorney fees to Testa, an attorney who was discharged for good cause.

The decisions below ignore not only the language of the District Court's March 28, 1995 order, but also the actual consequences that the order had on Testa and Hardy. In addition to setting aside the settlement, the order further required Hardy to deposit $750,000 into the registry of the court, i.e. the entire amount disbursed as a partial distribution under the October 1992 settlement. (App. 38a). The $750,000 distribution included sums that Testa had retained pursuant to his contingency fee contract. If the February 1993 stipulation was dispositive of Testa's fee recovery, why did the District Court in effect order Testa to return his one-third of the $750,000 disbursement to the registry

of the Court? It cannot be refuted that the overall consequence of the District Court's order was to restore the parties to the same positions they had held before the October 1992 settlement. Thus, as of the District Court's March 28, 1995 order, the February 1993 stipulation was without legal or actual effect.

In relying on the February 1993 stipulation as the sole basis for awarding attorney fees, the District Court overlooked the actual, real-world effect that the March 28, 1995 order had on the parties. In its April 15, 1999 order, the District Court reasoned:

> There are two documents at issue, the contingency fee agreement between Hardy and Testa and the settlement which needed British High Court approval. The existence of one is not dependent on the other. The settlement did, indeed, contain a suspensive condition, i.e. court approval, before it became enforceable. The contingency fee contract had no suspensive conditions. It was valid, perfected contract since its date of execution. It was voidable because good cause existed to terminate Testa & Testa. However, voidability and suspensive condition are mutually exclusive legal concepts.

(App. 20a-21a). The legal distinction drawn by the District Court fails to account for the fact that the

District Court's March 28, 1995 order restored the parties to the exact positions they had been in before the October 1992 settlement and the February 1993 stipulation. Additionally, the legal distinctions relied on by the District Court cannot be reconciled with the District Court's March 28, 1995 order declaring that "the attempted settlement of all claims . . . is hereby SET ASIDE." (App. 38a).

The Courts' reliance on the February 1993 stipulation as the sole basis for awarding attorney fees confounds all due process principles embodied in the doctrine of collateral estoppel. The February 1993 stipulation was dissolved by the District Court's March 28, 1995 order, a decision that paved the way for Testa to proceed forward with his intervention claim for *quantum meruit* recovery of attorney fees. In ignoring the collateral estoppel effect of the March 28, 1995 order, the Courts have rendered an unprecedented decision in which an attorney who was discharged for good cause recovered his entire fee based solely on a stipulation that is without legal effect.

II. IT WAS ERROR AND A DENIAL OF DUE PROCESS TO RENDER JUDGMENT SOLELY ON THE BASIS OF CONTRACT RATIFICATION, WHERE THE ISSUE OF CONTRACT RATIFICATION WAS NOT PLED OR OTHERWISE RAISED PRIOR TO TRIAL

There is no question whatsoever that neither the issue of ratification nor anything resembling the issue

appeared in the pleadings, the pretrial order, or anywhere else in the record prior to commencement of trial. In his appellate brief, Testa erroneously represented that ratification was an issue throughout the proceeding, was pled in the pretrial order, and was specifically reiterated by counsel for Testa in the opening moments of trial. (Testa's Brief, p. 37) However, Testa could cite to no reference in the record in support of these erroneous assertions, because none exists. In view of the Fifth Circuit's summary affirmance of the decision of the District Court, Hardy can only surmise that the Fifth Circuit accepted Testa's erroneous representations as accurate, without delving into the intricacies of the fifty volume record. Testa's failure to timely plead the issue of ratification violated the notice requirements embodied in Rules 8 and 16(e) of the Federal Rules of Civil Procedure, and the Courts' reliance on the issue as the sole basis for the decisions below resulted in a denial of due process.

The central meaning of procedural due process is that parties whose rights are to be affected are entitled to be heard, and in order that they may enjoy that right, they must be notified. *Fuentes v. Shevin*, 407 U.S. 67, 80, 92 S.Ct. 1983, 1994, 32 L.Ed.2d 556 (1972), citing *Baldwin v. Hale*, 1 Wall. 223, 233 (1864). It is equally fundamental that the right to notice and an opportunity to be heard must be granted at a meaningful time and in a meaningful manner. *Id.*, citing *Armstrong v. Manzo*, 380 U.S. 545, 552, 84 S.Ct. 1187, 14 L.Ed.2d (1965).

The Federal Rules of Civil Procedure contain several provisions that preserve the due process right to

notice and an opportunity to be heard. The general notice pleading requirements are set forth in Fed. Rule Civ. Pro. 8(a) and (c). Fed. Rule Civ. Pro. 8(a) provides: "A pleading which sets forth a claim for relief . . . shall contain: . . . a short and plain statement of the claim showing that the pleader is entitled to the relief . . ." It surely cannot be argued that Testa's intervention complaint contains a statement of the claim of ratification. (See App. 43a-44a)

Of particular importance to the present case is Fed. Rule Civ. Pro. 16(e), Pretrial Orders, which provides:

> After any conference held pursuant to this rule, an order shall be entered reciting the action taken. This order shall control the subsequent course of the action unless modified by a subsequent order. The order following a final pretrial conference shall be modified only to prevent manifest injustice.

The Supreme Court has never directly interpreted the meaning and scope of Fed. Rule Civ. Pro. 16(e), but has indicated in dicta that a pretrial order under Fed. Rule Civ. Pro. 16(e) has preclusive effect. See *Lankford v. Idaho*, 500 U.S. 110, 130-131, 111 S.Ct. 1723, 1735, 114 L.Ed.2d 173 (1991) ("A pretrial order having such preclusive effect is typically entered pursuant to an order or statute that says it will be preclusive. See e.g. Fed. Rule Civ. Proc. 16(e).")

Under Fifth Circuit precedent, a joint pretrial order signed by both parties supersedes all pleadings and governs the issues and evidence to be presented at trial. *Elvis Presley Enterprises, Inc. v. Capece*, 141 F.3d 188, 206, 46 USPQ.2d 1737 (5th Cir. 1998); *McGehee v. Certainteed Corp.*, 101 F.3d 1078, 1080 (5th Cir. 1996); *Branch-Hines v. Hebert*, 939 F.2d 1311, 1319 (5th Cir. 1991). Once the pretrial order is entered, it controls the course and scope of the proceedings under FRCP 16(e), and if a claim or issue is omitted from the order, it is waived, even if it appeared in the complaint. *Elvis Presley*, 141 F.3d at 206; *Valley Ranch Dev. Co. v. FDIC*, 960 F.2d 550, 554 (5th Cir. 1992) ("The law is plain. Plaintiffs omitted their underlying claims from the pretrial order, and they are waived."); *Canal Ins. Co. v. First General Ins. Co.*, 889 F.2d 604, 609 (5th Cir. 1989); *Flannery v. Carroll*, 676 F.2d 126, 129 (5th Cir. 1982).

In the present case, the pre-trial order is preserved under seal to protect the secrecy of settlement figures. The pretrial order makes no mention of ratification or any similar issue. The pretrial order does mention the February 1993 stipulation on three occasions, but it surely cannot be seriously contended that merely mentioning the existence of the document was sufficient to place Hardy on notice that she would have to defend against a claim of ratification.

Consistent with Testa's failure to include ratification in the pretrial order, the pre- and post-trial record in this case presents a dramatic contrast concerning the issue of ratification. Prior to trial, neither ratification nor any similar issue is pled or otherwise

mentioned. After trial, the parties argued ratification in five separate memoranda. Testa first raised the issue of ratification in a June 18, 1998 post-trial brief. After devoting thirty pages to arguing that he was not discharged for cause, Testa devoted the last four pages of his brief to the issue of ratification. On July 6, 1998, Testa filed a rebuttal to Hardy's post-trial brief in which he devoted eighteen pages to the issue of ratification.

Hardy did not respond to Testa's arguments concerning ratification. However, on December 22, 1998, the District Court issued a minute entry ordering Hardy to file a post-trial memorandum on ratification. On January 25, 1999, some eight months after the conclusion of trial, Hardy addressed the issue of ratification for the first time. Hardy argued among other things that ratification was not properly pled under Fed. Rule Civ. Pro. 8, and that reliance on a settlement stipulation was contrary to Federal Rule of Evidence 408. On February 8, 1999, Testa submitted a seven page response to Hardy's position on ratification. On February 18, 1999, Hardy filed a rebuttal memorandum pointing out nine material facts that she could not have known at the time of the February 1993 stipulation.

This case is similar to *J.B.N. Morris v. Homco International, Inc.*, 853 F.2d 337 (5th Cir. 1988), in which the Fifth Circuit set forth the following analysis under FRCP 16(e):

> The district court held a pretrial conference in this case and issued a final order signed by the judge and the parties.

> The parties did not seek amendment of the order nor did the court amend it. The order never explicitly or implicitly raised the issue of substantial performance. An issue or theory not even implicitly included in the pretrial order is barred unless the order is subsequently amended "to prevent manifest injustice." Under the circumstances of this case, Homco had no notice that the issue of Morris's substantial performance would be important in the litigation until the time had passed to meet the issue squarely. The district court, therefore, erred in relying on the doctrine to grant Morris relief when Morris had neither pleaded the claim nor urged it at the pre-trial conference.

Id. at 343 (footnote omitted). The result should be no different in this case. The record leaves no question that the issue of ratification was first interjected by Testa after the conclusion of trial. Additionally, the District Court's Order itself leaves no question that it was only after the conclusion of trial that the issue of ratification was interjected into the proceedings:

> The Court notes that, although Testa clearly argued *ratification in post-hearing memoranda* filed herein, there was no response to that argument by opposing

> counsel. Because of the Court's belief that this was a point of major concern, a conference was convened and counsel for Mrs. Hardy was given further time to brief this point. . . .
>
> Regarding Hardy's argument that Testa failed to plead ratification as an affirmative defense, the Court notes that Hardy's counsel was given added time to address the issue *as soon as the Court realized* its potential applicability herein.

(App. 17a and 19a; emphasis added).

The record of this case clearly shows that Hardy, like the defendant in *J.B.N. Morris*, had no notice that the issue of ratification would be important in the litigation until the time had passed to meet the issue squarely. As in *J.B.N. Morris*, the District Court erred in relying on the doctrine of ratification as the sole basis for granting relief to Testa, because Testa neither pled the issue nor urged it at the pre-trial conference. See *Id*, 853 F.2d at 343.

Additionally, the trial transcript leaves no question that during trial, neither the Court nor counsel were aware of the ratification issue. When counsel for Testa began questioning Hardy concerning the February 26, 1993 hearing that resulted in the stipulation which forms the basis of Testa's ratification argument, the following telling exchange took place:

[Counsel for Hardy]: I have to object to this. Goes far afield. Nothing to do with just cause for Mr. Testa and explicitly is referred to by the district court, March 28.

The Court: I am *not sure why we[']re going into that.* Ask you next question.

[Counsel for Testa]: My next question is, I refer the Court to Intervenor Exhibit Number 4.

[Counsel for Hardy]: Joint Stipulation entered into, overturned by The District Court later on. We are going around and around in a circle.

The Court: *Why are we doing this?*

[Counsel for Testa]: We are doing this, this is a *reconfirmation* of the settlement of October 23, that's the reason.

[Counsel for Hardy]: It was set aside.

The Court: Are you offering this? *What are you going to do with this?*

[Counsel for Testa]: I was going to ask her to identify it, background questions and ask her questions about it.

The Court: Go ahead.

[Counsel for Hardy]: Can I get a ruling?

> The Court: Your objection is overruled. The *reason* it is overruled is that one of the things that is being contested here is the *quality of the man's services to her.* The man negotiated a 2.9 million dollar settlement while he was still counsel of record for her. Here we are on February 26, 1993, trying to get approval for the same 2.9 million dollars. *And it had something to do with the relevancy of the services of the man.*

(April 24, 1998 Transcript, p. 121-122; emphasis added).

Thus, the Court overruled Hardy's objection to evidence concerning the February 1993 stipulation solely on grounds that the stipulation related to the quality of Testa's services, a factual inquiry appropriate to the quantum meruit issue on which the case went to trial – but not to the legal issue of contract ratification. To rely on ratification under these circumstances is surely a violation of Fed. Rule Civ. Pro. 8 and 16(e). Moreover, to award one hundred percent of the fees in dispute to Testa based solely on a legal issue that was not raised prior to trial is a denial of due process.

III. THE FIFTH CIRCUIT DENIED PETITIONER DUE PROCESS BY PLACING THIS COMPLEX MATTER ON THE COURT'S SUMMARY DOCKET, AND SUBSEQUENTLY RENDERING DECISION BASED ON AN ERRONEOUS RECITATION OF THE FACTS

In recent years, many federal and state appellate courts have instituted summary docket procedures as an effective means of reducing overcrowded dockets. Summary docket procedures are ideal for cases that have short or uncomplicated records and that present well-settled issues of law. However, this is not such a case. This case involves a long and convoluted fifty volume record, a five day trial, a $966,667 amount in controversy, and important due process questions. The proceeding before the Fifth Circuit demonstrate that by placing this long and complicated case on the Summary Docket, the Fifth Circuit denied Hardy the opportunity to be heard.

In its two page opinion, the Fifth Circuit recited two critical factual errors, as well as three other errors of fact that suggest a lack of attention to the details of the long and complicated fifty volume record. Additionally, the Fifth Circuit did not address Hardy's arguments as to why reliance on the doctrine of contract ratification was inappropriate and a denial of due process.

The Fifth Circuit's opinion erroneously states, "Because of difficulties in securing the approval of the High Court of England, Hardy terminated her contingent

agreement with Testa . . ." (App. 2a) This is a critical misunderstanding of the facts. The District Court found that Hardy had many reasons for the good cause discharge of Testa, none of which related to difficulty in securing the approval of the High Court of England. (See App. 10a-14a). It was critical for the Fifth Circuit to understand that when Hardy discharged Testa for good cause on November 8, 1992, she had no idea that there were problems with the October 1992 settlement agreement, much less that the agreement would not be approved by the High Court of England. As Hardy detailed at pages 14-16 of her appellate brief, she had no idea of these problems because Testa had hidden the problems from her.

The foregoing distinctions are critical, because the February 1993 stipulation was entered into less than four months after Hardy discharged Testa, and at a time when she could not have known that her settlement could not be approved by the High Court of England. The October 1992 settlement was not even presented to the British High Court for approval until sometime after June 1993, i.e. about four months after the February 1993 stipulation. It was not until October 21, 1994, i.e. about two years after Testa's discharge, that the High Court of England finally ruled that Hardy's settlement could not be approved.

The Fifth Circuit's erroneous conclusion that Hardy discharged Testa because of difficulty in obtaining High Court approval, rather than for good cause based on numerous instances of professional misconduct, apparently precluded appreciation of Hardy's position as

to why reliance on the February 1993 stipulation is improper. If Testa had informed Hardy that her settlement agreement could not be approved by the High Court of England, the October 1992 settlement would not have been entered, and the February 1993 stipulation clarifying terms of the settlement would have been unnecessary. By awarding recovery based solely on the February 1993 stipulation, the Courts have rewarded Testa for the direct consequences of his misconduct.

Additionally, the opinion of the Fifth Circuit states that "Keaty and Keaty . . . waived any claim as to the attorney's fees which might be owed on the first $2.9 million of that settlement." (App. 2a-3a). Reliance on this factual conclusion demonstrates a lack of attention to the fundamental details of Hardy's argument and of this case. There is simply no proper evidence to support the above factual conclusion, including no testimony on the issue. Testa's contention that Keaty has no interest in the $966,667 in attorney fees is based entirely on the transcript of a June 23, 1993 hearing in which Thomas Keaty stated that Keaty had no interest in the $2.9 million. (Testa's Brief, pp. 8-9). Keaty's testimony was made almost two years before Hardy's October 1992 settlement was set aside. During the trial of this matter, no representative of Keaty was called to testify to explain the foregoing testimony, which at that point was nearly five years old and simply no longer correct. Additionally, although the question of whether Keaty had an interest in Hardy's recovery was not raised in pleadings, discovery, or the pre-trial order, the proper evidence of

record leaves no question whatsoever that Keaty has an interest in Hardy's recovery pursuant to a contingency fee contract. When counsel for Testa asked Hardy whether she was obligated to pay a fee to Keaty, Hardy answered, "Yes." (April 24, 1999 Transcript, p. 128). Keaty further stipulated at trial that Hardy had a contingency fee contract. (April 24, 1999 Transcript, p. 133). Had the issue been properly raised, Keaty could have readily explained how his representation of Hardy changed after the June 23, 1993 hearing – or at least would have been afforded his due process opportunity to do so. Having failed to mention the issue of Keaty's interest in the pretrial order, the issue is waived. Fed. Rule Civ. Pro. 16(e); *Elvis Presley*, 141 F.3d at 206.

Other instances of lack of attention to the details of the long and complicated fifty volume record appear in the Court's two page opinion. The opinion states that "Keaty and Keaty ultimately settled Hardy's claims for $4.5 million . . .." In fact, Keaty settled Hardy's claims for a higher figure. Additionally, the opinion sets forth the amount of the settlement without noting that the amount of the settlement had been preserved under seal by order of the District Court. The opinion also states that a four day hearing was held, when in fact it was a five day hearing. While these latter factual errors were not critical to the outcome of the appeal, Hardy's counsel cannot help but be concerned with the lack of attention that has been paid to the details of this long, hard fought case in which a $966,667 recovery is at stake. It is difficult to imagine that these errors would have been made if this case had been placed on the Fifth

Circuit's regular docket and given the attention it deserved.

It is respectfully submitted that by placing this complex case on the Summary Docket, by reciting numerous factual errors in its opinion, and by not addressing Hardy's arguments, the Fifth Circuit denied Hardy the due process opportunity to be heard.

CONCLUSION

For all of the reasons identified herein, a writ of certiorari should issue to review the decision of the United States Court of Appeals for the Fifth Circuit and, ultimately, to vacate and reverse the judgment below and remand for further proceedings to address and resolve the *quantum meruit* issues on which this case originally went to trial.

Respectfully Submitted:

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UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-30625
Summary Calendar

In Re: In the Matter of the Complaint of MALMAC DN BHD; et al., Owners and/or operators and/or owners of the barge DB 29 for exoneration from or Limitation of Liability,

MICHAEL TESTA; LAW FIRM OF TESTA AND TESTA,
Intervenors-Appellees,

VERSUS

MICHAEL LEE; ET AL.,
Claimants,

JULIE HARDY, Individually and as the representative of the estate of Stephen Hardy and on behalf of and as next friend of Kirsty Leanne Hardy, Laura Stacey Hardy, and Ben Derek Hardy,who also sue individually and on behalf of any other proper legal beneficiaries of Stephen Hardy, Claimant-Appellant.

Appeal from the United States District Court
For the Eastern District of Louisiana
(91-CV-3016)

January 26, 2000, Filed

Before HIGGINBOTHAM, DeMOSS, and STEWART, Circuit Judges.

PER CURIAM:[1]

Stephen Hardy ("decedent") a commercial diver and resident of England, died on August 15, 1991, when the derrick barge DB-29 capsized and sank in the South China Sea during a typhoon. Decedent was survived by his spouse, Julie Hardy, and the three children of their marriage; by his former spouse, Ann Hardy, and the two children of their marriage; and by his parents. All of decedent's survivors were residents of England. Shortly thereafter, McDermott, as owner and/or operator of the barge DB-29, filed this limitation of liability proceeding in the United States District Court for the Easter District of Louisiana. Later on in August 1991, Julie Hardy and her thee minor children (collectively "Hardy") retained Michael Testa and his law firm Testa and Testa (collectively "Testa") to represent their interests in the limitation proceeding pursuant to a written contingent fee agreement. Testa negotiated a settlement of all of Hardy's claims for $2.9 million from McDermott and such settlement was approved by the federal district judge handling the limitation of liability proceedings subject to final approval by the High Court of England as to the interests of the first wife, Ann Hardy, and the parents of Stephen Hardy. Because of difficulties in securing the approval of the High Court of England, Hardy terminated her contingent fee agreement with Testa and later retained the services of Keaty and Keaty as counsel to process her claims against McDermott. Keaty and Keaty ultimately settled Hardy's claims for 4.5 million and waived any claim as to attorney's fees which might be owed on the first $2.9 million of that

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[1] Pursuant to 5th CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th CIR. R. 47.5.4.

settlement. The sum of $966,667 was placed on deposit in the registry of the court representing the disputed attorney's fees as to the first $2.9 million of the settlement. Testa filed an intervention seeking recovery of the attorney's fees contemplated under the terms of the written contingency agreement with Hardy. Hardy disputed her obligation to pay such fees and Testa and Hardy consented in writing to the trial and entry of final judgment on their dispute by the magistrate judge. After conducting a four-day evidentiary hearing, the magistrate judge entered an order and reasons and a final judgment awarding $966,667 in the registry of the court to Testa as attorney's fees pursuant to the employment agreement. Hardy timely filed an appeal from that final judgment.

We have carefully reviewed the briefs, the reply brief, the record excerpts, and relevant portions of the record itself. For the reasons stated by the magistrate judge in her order and reasons filed under date of April 15, 1999, we affirm the final judgment entered of even date therewith.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-30625
Summary Calendar
D.C. Docket No. 91-CV-3016-A

In Re:In the Matter of the Complaint of MALMAC DN BHD; ET AL, Owners and/or operators and/or owners of the barge DB 29 for Exoneration from or Limitation of Liability

MICHAEL TESTA; LAW FIRM OF TESTA AND TESTA
Intervenors – Appellees

v.

MICHAEL LEE; ET AL
Claimants

JULIE HARDY,

JULIE HARDY, Individually and as the representative of the estate of Stephen Hardy and on behalf of and as next friend of Kirsty Leanne Hardy, Laura Stacey Hardy, and Ben Derek Hardy, who also sue individually and on behalf of any other proper legal beneficiaries of Stephen Hardy.

Claimant - Appellant

Appeal from the United States District Court for the Eastern District of Louisiana, New Orleans

January 26, 2000, Filed

Before HIGGINBOTHAM, DeMOSS, and STEWART, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was taken under submission on the briefs on file.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

It is FURTHER ORDERED that appellant pay to appellees the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE: March 1, 2000

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-30625

In Re:In the Matter of the Complaint of MALMAC DN BHD; ET AL, Owners and/or operators and/or owners of the barge DB 29 for Exoneration from or Limitation of Liability

MICHAEL TESTA; LAW FIRM OF TESTA AND TESTA
Intervenors - Appellees

v.

MICHAEL LEE; ET AL
Claimants

JULIE HARDY,

JULIE HARDY, Individually and as the representative of the estate of Stephen Hardy and on behalf of and as next friend of Kirsty Leanne Hardy, Laura Stacey Hardy, and Ben Derek Hardy, who also sue individually and on behalf of any other proper legal beneficiaries of Stephen Hardy.

Claimant - Appellant

Appeal from the United States District Court for the Eastern District of Louisiana, New Orleans

February 22, 2000, Filed

ON PETITION FOR REHEARING

Before HIGGINBOTHAM, DeMOSS, and STEWART, Circuit Judges.

PER CURIUM:

IT IS ORDERED that the petition for rehearing filed in the above case is DENIED

s/ Harold R. DeMoss
United States Circuit Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

No. 91-3016-A-5

IN THE MATTER OF THE COMPLAINT OF MALMAC SDN BHD, ET AL

April 15, 2000, Filed

ORDER AND REASONS

Presently before the Court is an intervention by Michael Testa and the law firm of Testa and Testa for attorneys' fees in connection with the representation of Mrs. Julie Hardy and her children in the above-captioned matter. Intervenor was discharged by Mrs. Hardy on November 8, 1992. In the above-captioned proceeding there are two issues which the Court must decide. The first has to do with whether or not the discharge of intervenor by Mrs. Hardy was with cause and, if so, the second issue is, what, if any, attorneys' fees intervenors are entitled to receive.

Stephen Hardy passed away on August 15, 1991. On August 27, 1991, Mrs. Julie Hardy, his widow, acting individually and on behalf of Kirstie, Laura, and Ben Hardy, decedent's minor children of that marriage, entered into a contingency fee agreement with Testa and Testa. That agreement authorized Michael Testa and Testa & Testa to pursue claims against McDermott under Federal law for the death of Stephen. Mrs. Hardy initially met Michael Testa several days after her husband died when he and Mr. Robert Loving approached her, at which time representation was discussed.

Subsequent to the signing of the contingency fee contract between these parties, Testa & Testa engaged

in negotiations with McDermott in connection with the claim. Mr. Testa admits that he did not file any type of discovery, including interrogatories or requests for production. He filed no motions; and he noticed no depositions while he was representing plaintiff(s). His office did, however, send representatives to attend and monitor various depositions that were taken in New Orleans and he, himself, attended depositions in England in furtherance of the case. Mr. Testa hired an economist, Ken McCoin, and an attorney, David Dover, to function as experts and to assist him in negotiating settlement for Mrs. Hardy.

According to Michael Testa, he had been instructed by Mrs. Hardy to settle the case and received authority to do so if an offer were made between the ranges of 2.5 and 3.0 million dollars. On February 21, 1992, Judge Thomas Testa, Michael Testa's father and legal associate, conveyed an offer in writing to Julie Hardy to settle her claim and that of her children in the amount of two million fifty thousand dollars. (Int. ex. 21). Michael Testa advised Mrs. Hardy not to accept this offer and, indeed, an counter offer was made to McDermott on March 6, 1992 in the amount of 7.5 million dollars. On April 3, 1992, McDermott responded by offering 2.5 million dollars to settle all claims. (Int. ex. 25). On April 6, 1992, Michael Testa forwarded a letter to Mrs. Julie Hardy wherein he confirmed a conversation authorizing him to settle claims on behalf of herself and her children in "the range of 2.5 to 3 million dollars". (Int. ex. 27). Following further negotiations, McDermott ultimately offered 2.9 million dollars in full and final settlement of the claims of Mrs. Hardy and the Hardy children on May 5, 1992. Michael Testa accepted this offer on May 6, 1992, following communications with Mrs. Hardy. (Int. exs. 29, 30).

On May 8, 1992, defense counsel corresponded with Michael Testa confirming the amount of the

settlement and stating that it was his understanding that Mr. Testa would "begin preparing the necessary paperwork to obtain letters of administration and approval of the settlement on behalf of Hardy's minor children". (Int. ex. 31). The Court notes that it is at this junction where significant problems began to develop between Michael Testa and Julie Hardy.

On May 18, 1992, in Yorkshire, England, Mrs. Hardy signed a receipt and release (ex. C-9) on behalf of herself and her three minor children. That agreement contains in pertinent part the following language:

> [a]s a further consideration for the aforesaid payment I hereby warrant that I am the sole party entitled to assert the claims mentioned hereinabove and hereby agree to protect, defend, indemnify, save, and hold harmless the released parties from and against any and all claims, demands, suits, liens, or causes of action which have been or may be made or asserted by or on behalf of any person, firm or corporation as a result of the injuries to the death of Stephen Hardy.

Under the terms of this receipt and release which Mr. Testa allowed Julie Hardy to sign, potential indemnity was visited upon her for the claims of Stephen Hardy's parents, Margaret and Derek Hardy, as well as those which might have been put forward by Stephen Hardy's former wife, Ann, individually and on behalf of her two minor children, Sarah Louise and Jane Elizabeth Hardy. At some point in May of 1992, Mr. Testa engaged the services of an English law firm, Gordons, Wright & Wright, to obtain court approval for the settlement at the British domicile of the children. Unlike American courts, Mr. Testa was advised that the

releases needed to be obtained from Ann Hardy and her two children in order to obtain court approval or else they had to be noticed in the proceeding before the English court or else the minors' settlement could not be entered. Neither Mr. Testa nor English counsel pursued the filing of anything in the British courts regarding the May 18th agreement.

Mr. Testa stated that the reason the agreement was not presented for approval by the British courts was that he determined that it needed to be amended to take into account the existence of Ann Hardy and her two children. Testa further stated that he did not know of the existence of Ann or her children until after the May 18th document was signed by Julie Hardy. The Court unfortunately does not believe this latter testimony given by Michael Testa.

Mrs. Julie Hardy testified that she told Mr. Testa about Ann Hardy and her two children in August of 1991. She further stated that in September, 1991 she forwarded a document to Mr. Testa which included information about Ann and her two children. The Court notes also that Mr. Testa knew of the existence of Derek and Margaret Hardy because at one point in time they were his clients in connection with the same unfortunate incident. In addition, Mr. Testa knew that the estate of Stephen Hardy had been opened in England and that the executor of that estate was not Julie Hardy but instead was Mr. Philip Wilson.

Mrs. Hardy testified that when she signed the initial agreement in May of 1992 she was promised that she would receive her money within thirty days. She further stated that no one explained the indemnification agreement referenced hereinabove to her. Mrs. Hardy definitively avers that she would not have agreed to any settlement if she had to use part of it to resolve claims of other individuals and the court gives credence to her statement.

After having been promised that she would receive funds within thirty days of the May, 1992 agreement, five months elapsed before another agreement was executed on October 13, 1992. (Ex. C-8). That document still contained an indemnity agreement but excepted therefrom Margaret and Derek Hardy, Ann Hardy and her two minor children by the deceased. Mrs. Hardy came to New Orleans in October, 1992 because she was told if she made this trip she would be able to receive funds. Julie Hardy avers that she believed that the entire 2.9 million dollar settlement was to be exchanged on October 13th but on that date, as she was walking to court with her attorney, was advised that she would only receive 750 thousand dollars. She further explained that the receipt and release which she executed was not read or explained to her and that she never had an opportunity to speak privately with her attorneys on that day about the release documents.

Mrs. Hardy left New Orleans under the impression that the remainder of the funds were being held in escrow and, within a short period of time, she would be receiving the remainder of that money. Subsequent to her return back to England, Mrs. Hardy received a letter from Michael Testa dated October 26, 1992 (Cl. Ex. 3) wherein she was asked to approach Ann Hardy and her two children to have them execute a release of all claims which they might have against McDermott. The consideration for that release was left blank, presumably so that Julie Hardy could negotiate on her own behalf with her deceased husband's first wife. Julie Hardy was never under the impression that any portion of the 2.9 million dollars to which she had agreed was to be given to Ann Hardy or her two children and was dismayed when it appeared she was being asked to do so.

When asked to enumerate why she terminated the services of Mr. Testa in November, 1992, Mrs. Hardy

gave a list of approximately six reasons which the Court enumerates as follows:

1. her loss of trust in him;

2. his failure to return her phone calls;

3. her belief that Mr. Testa alienated her from the executor of her husband's estate;

4. her belief that Mr. Testa alienated her from her deceased husband's parents;

5. his asking her to come to Houston under the false pretense of receiving the full amount of her settlement;

6. the financial crunch that she was in since she was promised money which she needed that was well delayed in coming.

Following her discharge of Mr. Testa, Julie Hardy employed the services of Keaty & Keaty.[3] That firm succeeded in having the receipt and release of claims executed on October 13, 1992 set aside, which paved the way for an ultimate resolution of the claims which netted an increased amount of funds to Mrs. Hardy and her children. This is not, however, to state or infer that the 2.9 million dollar figure negotiated by Mr. Testa, if applied to Julie Hardy and her children individually, was not a good settlement figure. In fact, by a joint stipulation entered into this Court's record on February 26, 1993, Mrs. Hardy and Thomas Keaty, her new counsel, are argued to have ratified the validity of that first settlement and, indeed, testimony was received indicating that they still would have taken this amount to resolve the claims in question.

Therefore, the problem, as the Court perceives it, is not whether the amount of money negotiated by Mr. Testa was inappropriate, if it was destined solely for Mrs. Hardy and her three children. The problem is the length of time between the initial agreement to obtain those funds and dispersal of same. Additionally, Mr. Testa's allowing Mrs. Hardy to execute release documents without having a complete understanding of British law and the rights of parents and other children thereunder, his insensitivity in expecting Mrs. Hardy to negotiate directly with the former wife of Stephen Hardy, and his failure to return her phone calls all combined to result in a complete lack of trust and confidence by Julie Hardy in her attorney.

Based on the above, the Court is of the opinion that Mrs. Hardy, indeed, did have good case to terminate Michael Testa and Testa & Testa in November of 1992. A more difficult issue is the amount of money, if any, to which Michael Testa and his firm should be entitled for services rendered to his former client. On this issue, the Court notes that Mr. Testa has not introduced any billing records into evidence to establish the time expended in his efforts nor has his file been introduced from which one might glean some indication of the amount of time invested. Therefore, even thought he obtained some type of benefit for Mrs. Hardy in that the 2.9 million dollars to which he had agreed on her behalf effectively became a floor for settlement purposes, he totally dropped the ball, so to speak, in bringing that transaction to a conclusion and the record is lacking in traditional evidence from which quantum meruit awards can be assessed.

On behalf of Mrs. Hardy, counsel has advanced the argument that Testa and his firm should be denied a fee in the entirety because he breached a fiduciary duty to his client and violated the Disciplinary Rules of Professional Conduct of the State of Texas. Hardy

argues that under Texas law, where an attorney engages in an act without the client's informed authorization, i.e., negotiating with McDermott for a receipt and release of Ann Hardy's claims, the attorney has committed a substantial breach of the attorney-client contract. Kelly v. Murphy, 630 S.W. 2d 759 (Tex. Civ. App.-Houston [1st Dist.] 1982, writ ref'd n.r.e.). In such instance, it is argued that it is irrelevant whether the client's interests have been damaged or impaired. Id. Further, counsel argues that, where an attorney has breached the contractual relationship between the parties, the attorney may not recover of services performed thereunder, whether on a contract basis or in quantum meruit. Royden v. Ardoin, 331 S.W. 2d 206, 160 Tex. 338 (Tex. 1960).

Under Texas law, quantum meruit is based upon unjust enrichment. Bashara v. Baptist Memorial Hospital System, 685 S.W. 2d 307, 310 (Tex. 1985). It is an equitable remedy which does not arise out of a contract, but is independent of it. Vortt Exploration Company, Inc. v. Chevron U.S.A., Inc., 787 S.W. 2d 942 (Tex. 1990). Recovery under quantum meruit requires proof that valuable services or materials were provided to the client and that non-payment for those services would result in an unjust enrichment to the party benefited by the work. City of Ingleside v. Stewart, 554 S.W. 2d 939 (Tex. Civ. App. – Corpus Christi, 1977, writ ref'd n.r.e.). Here counsel argues that there has been no unjust enrichment of Mrs. Hardy or her children. Rather, they were prejudiced and spent a considerable amount of money and time following discharge of Mr. Testa and his firm attempting to return to the position they were in prior to his representation of them.

Testa, on the other hand, argues that he was discharged without good cause, that he was not allowed to complete his work under his contingency fee contract

and that under Texas law he is entitled to the full fee under that agreement. Alternatively, Testa argues that, if the Court finds that he was discharged for cause, Mrs. Hardy ratified the contingency fee contract at issue and that payment of those fees in full is still due and owing.

Under Texas law, whether and how to compensate an attorney when a contingency fee contract is prematurely terminated depends upon whether the attorney was discharged, withdrew with the consent of the client, or withdrew voluntarily without the client's consent. Augustson v. Linea Aerea National-Chile, S.A., 76 F.3d 658 (5th Cir. 1996). The issue of whether someone is discharged for good cause is a fact-based one and the Court, as noted above, has found that good cause existed for Testa's discharge. There is no jurisprudential "bright line" whereby good cause may be defined. However, Testa concedes that cause has been found in other instances when an attorney has been determined to have been either professionally negligent or to have committed a material breach of his contract. Rocha v. Ahmad, 676 S.W. 2d 149 (Tex. App. –San Antonio 1984, writ dis'd w.o.j.). In the opinion of the undersigned both of those standards have been breached in this case.

A much bigger problem, however, is the argument by Testa that Julie Hardy has ratified his contingency fee contract and the amount of his fee by her actions on February 26, 1993, when she entered into a joint stipulation in open court (Rec. Doc. 677, Exh. I-4). Ratification of a contract is the adoption or confirmation by a person, with knowledge of all material facts, of a prior act which did not then legally bind the person, and which the person had the right to reject. Enserch Corp. v. Rebich, 925 S.W. 2d 75 (Tex. App. – Tyler 1996, writ dis'd). Action or conduct that effectively recognizes the existence of the contract constitutes a ratification of that contract. Sun Operating Ltd. Partnership v. Oatman,

911 S.W. 2d 749 (Tex. App.-San Antonio 1995, writ den.). When a party does ratify a contract, he or she becomes bound by its provisions. Furthermore, a party waives the right to rescind the contract or seek damages pursuant to the contract once that contract has been ratified. Spellman v. American Universal Investment Co., 687 S.W. 2d 27 (Tex. App.-Corpus Christi 1984, writ ref'd n.r.e.). Ratification arises when a party either expressly or impliedly from a course of conduct affirms a prior commitment with full knowledge of the facts of the earlier act and with the intention of giving validity to the earlier act. Old Republic Ins. Co., Inc. v. Fuller, 919 S.W. 2d 726 (Tex. App.-Texarkana 1996, writ den.); Motel Enterprises, Inc. v Nobani, 784 S.W. 2d 545 (Tex. App.-Houston [1st Dist.] 1990, no writ).

Testa further argues that the question of ratification of a contract may be determined as a matter of law if the relevant evidence is uncontroverted or uncontrovertible. Sawyer v. Pierce, 580 S.W. 2d 117 (Tex Civ. App.-Corpus Christi 1979, writ ref'd n.r.e.). The critical factor in determining whether the contract has been ratified is if the party, at the time he or she ratifies the act, has knowledge of the material facts relating to the prior transaction. Rourke v. Garza, 530 S.W. 2d 794 (Tex. 1975). In order to ratify a contract under Texas law, a party must perform a voluntary, intentional act which is inconsistent with an intention of avoiding the prior agreement. Old Republic, supra; Olney Savings & Loan Assn. v. Trinity Banc Sav. Ass'n, 885 F. 2d 266 (5th Cir. 1989).

The Court notes that, although Testa clearly argued ratification in the post-hearing memoranda filed herein, there was no response to that argument by opposing counsel. Because of the Court's belief that this was a point of major concern, a conference was convened and counsel for Mrs. Hardy was given further time to brief this point.

In response, Mrs. Hardy contends that the requisite elements for ratification under Texas law are lacking. More specifically, counsel argues that "knowledge of all material facts" was missing at the time of the alleged ratification on February 26, 1993. Those material facts are identified as the mistaken belief that British High Court approval of the settlement would be obtained and that the interests of Stephen Hardy's children were protected by the stipulation and proposed settlement.

Counsel further argues that Mrs. Hardy received no benefit as is required for ratification. Since the stipulation in question was ultimately rescinded, counsel clearly feels this nullified any legal effect attendant thereto, including ratification. In other words, counsel argues there was an unwritten suspensive condition to the attorneys' fee agreed upon therein and that was the enforceability of the stipulation and approval by the British High Court. Further, it is argued that, per this Court's order of March 28, 1995, there was a judicial reversal of the February, 1993 stipulation, making it therefore null and void in all respects. A null obligation, as argued by counsel, cannot be ratified. Walmsley v. Champlin Refining & Chemicals, Inc., 11 F. 3d 534 (5th Cir. 1993), cert. denied, 514 U.S. 1037, 115 S.Ct. 1403 (1995).

Counsel further argues Testa's lack of clean hands and therefore his inability to seek equitable relieve, either by way of quantum meruit or ratification. Next, counsel contends that, pursuant to Rule 8 of the Federal Rules of Civil procedure, ratification should not be considered as an affirmative defense because it was not timely pled and is contrary to Federal Rule of Evidence 408. Finally, it is argued that the contingency fee contract on its face fails to include the signature of a proper representative for the estate of Stephen Hardy

and therefore no fee may be obtained from the estate of the deceased.

Regarding Hardy's argument that Testa failed to plead ratification as an affirmative defense, the Court notes that Hardy's counsel was given added time to address the issue as soon as the Court realized its potential applicability herein. Counsel suggests no added evidence which is missing from the record which might refute the applicability of the defense. Furthermore, evidence was admitted at the trial tending to support ratification as a valid issue.

In short, the Court believes that Hardy suffers no prejudice by ratification being considered herein. The only suggestion as to how counsel would have handled the issue had ratification been more specifically stated earlier is that counsel would have objected to the introduction of the stipulation. (Rec. doc. 677). The Court can only note that such an objection would have been overruled. The stipulation is a matter of public record and has bearing on the quality of services which Testa performed. Since no other trial strategy is implicated, the Court believes that the interest of justice outweighs the procedural hurdle which Hardy attempts to interpose. Therefore, ratification is being considered herein.

The record reflects that on February 26, 1993, a joint stipulation was entered into the record of this Court which provides in pertinent part as follows:

> [p]ursuant to all proceedings in the above-entitled matter held in Court this day, discussion of counsel and parties, argument, and stipulations by the undersigned parties, all of the claims which they have, have had, or may have regarding payment and disbursements of the $2,900,000.00 settlement funds paid

to settle the claims of Julie Hardy, individually, as administratrix of the Succession of minor children, Kirsty Leanne Hardy, Laura Stacey Hardy, and Ben Derek Hardy, and as personal representative of Stephen Hardy, shall be disbursed as follows:

To Julie Hardy	$1,070.944.08	
To Kirsty Leanne Hardy	100,000.00	in trust
To Laura Stacey Hardy	100,000.00	in trust
To Ben Derek Hardy	100,000.00	in trust

Plus a pro-ration of all interest accrued in accordance with the disbursement;

To Michael Testa $ 779,055.92

Plus interest earned on that sum from date of deposit in the Registry of the Court.....

That stipulation, Rec. Doc. 677, was executed by Julie Hardy, individually and as guardian of her three minor children, by Thomas Keaty as their attorney, by Michael Testa, individually and by his attorney, Norman Mott, by James K. Carroll on behalf of petitioners in limitation, and by U.S. District Judge Charles Schwartz, Jr.

The Court next addresses the argument that the elements of ratification are absent because Hardy lacked material facts at the time the stipulation was signed. The Court notes that Hardy focuses on the validity of the stipulation and settlement and the approval by the British High Court as the defining issue. However, the Court disagrees that this is pivotal.

There are two documents at issue, the contingency fee agreement between Hardy and Testa and the settlement which needed British High Court

approval. The existence of one is not dependent on the other. The settlement did, indeed, contain a suspensive condition, i.e., court approval, before it became enforceable. The contingency fee contract had no suspensive conditions. It was a valid, perfected contract since its date of execution. It was voidable because good cause existed to terminate Testa & Testa. However, voidability and suspensive condition are mutually exclusive legal concepts.

It is clear that, at the time the stipulation was executed, Mrs. Hardy was in possession of all of the facts concerning Mr. Testa's handling of the case. Those matters which constituted cause for her terminating him had already occurred and were known to both her and her new attorney. As noted by counsel for Mr. Testa, Mrs. Hardy was under no legal obligation to confirm the attorney's fees in question;[1]/ yet she certainly and unequivocally did so in that stipulation. Indeed, she had the option of contesting Testa's fee or repudiating his services entirely, but she did not do so. Additionally, she continued to retain the $750,000.00 partial distribution of the $2,900,000.00 in settlement funds which she had received in October, 1992 while still represented by Mr. Testa for at least another three years until an order of Court was obtained to the contrary. Moreover, Mrs. Hardy does not contest the fact that she entered into this stipulation voluntarily following consultation with her new counsel, Keaty & Keaty.

The Court is of the opinion that Mrs. Hardy has ratified the contingency fee contract with Mr. Testa which she now seeks to have the Court repudiate. Mr.

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1 / In fact, it is standard procedure for succeeding counsel to settle a case without prior approval of counsel who has withdrawn. Thereafter, both counsel resolve which portion of the contingency fee goes to which lawyer.

Testa did not represent Mrs. Hardy at or following the time that this stipulation was entered into the record. Therefore, the mutual responsibilities of Testa and Hardy were fixed at that point in time. While counsel for Julie Hardy wishes the Court to void any fee arrangement between her and Testa based upon allegations of abandonment of the client, this simply cannot be done once a valid ratification has occurred since any acts of alleged abandonment pre-dated the ratification.

Hardy has further argued that, since the stipulation which contained the acknowledgement of Testa's fees was ultimately revoked, the ratification contained therein was also nullified. The Court is unaware of any jurisprudence which makes a ratification conditional and Hardy fails to cite any. As noted earlier, ratification occurs with the performance of a voluntary act which is inconsistent with the repudiation of the contingency fee contract. Old Republic, supra. That act was recognition in a court document that a given fee was owed. The fact that the settlement did not ultimately go through has nothing to do with the voluntariness of the admission. It has only to do with when the fund out of which the sum would be satisfied came into existence.

Furthermore, the Court notes that failure to allow Testa the fee which he seeks herein results in a windfall to Julie Hardy. Keaty & Keaty have acknowledged that they have no interest in the money at issue. Therefore, if Testa is not allowed his fee, the entirety of the money reverts to Mrs. Hardy. The plain fact of the matter is that Testa did perform a substantial service for Hardy and her children, albeit an imperfect one.

The Court further acknowledges that the procedure of disposing of these claims became more convoluted as time passed. Undoubtedly, added expenses were incurred before the matter was ultimately

concluded. However, the parties have chosen to piecemeal this litigation in that Hardy contends that she suffered increased expenses as a result of Testa's handling of her affairs. Yet she failed to introduce evidence which documented any such matters, attempting instead to leave that issue to a malpractice litigation which she has instituted win Texas state court against Testa and his firm. Hardy, et al v. Testa, et al., #282,977-401, Probate Court No. 1, Harris County, Texas. (Exh. I-69).

In short, as presented to the undersigned, this matter in its simplest form addresses the issues of cause to terminate and the effect of a valid ratification of what would otherwise have been a contract which would not have been enforced. As so stated, the Court finds that the contract between Mrs. Hardy and Mr. Testa was ratified on February 26, 1993 and is therefore enforceable by the Court.

Mr. Testa and Testa & Testa will be awarded an attorney's fee as set forth in the contingency fee contract of one third of $2,900,000,[2]/ equaling $966,666.67, less and except any sums retained by intervenors which are credits to this amount. There will be judgment accordingly.

New Orleans, Louisiana this 13th day of April, 1999.

s/ ALMA L. CHASEZ
UNITED STATES MAGISTRATE JUDGE

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[2] / Although the contingency fee contract appears to call for a forty percent fee after the suit was file, Testa has asked for one third. (See post-trial memo of intervenor dated June 15, 1998). The Court limits the award to this amount.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION NO. 91-3016-A

IN THE MATTER OF THE COMPLAINT OF MALMAC SDN BHD HYDRO MARINE SERVICES, INC., EASTERN MARINE SERVICES, INC. AND MCDERMOTT INTERNATIONAL, INC. FOR EXONERATION FROM OR LIMITATION OF LIABILITY

March 28, 1995, Filed

ORDER AND REASONS

This matter is before the Court on a Rule to Show Cause Why the Julie Hardy Settlement Should Not Be Set Aside. By this Court's Order of October 17, 1994, the rule was continued pending a final determination by the High Court in England with respect to a declaratory judgment writ filed by petitioners. That honorable tribunal has since issued its ruling, and the rule to show cause was reset for hearing on January 18, 1995. The Court, having considered petitioners' Motion for an Evidentiary Hearing and Proposed Findings of Fact and Julie Hardy's Opposition thereto, concludes that the record is sufficient for adjudication of the rule and that an evidentiary hearing is unnecessary.[1] Considering the

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[1] Petitioners' Motion and Proposed Findings add nothing to the Court's appreciation of the underlying particulars of the present dispute. All parties have submitted to this Court copious memoranda and supporting exhibits setting forth the facts and law relating to the enforceability of the Julie Hardy settlement. In light of the English High Court's opinion resolving any issue of

extensive memoranda submitted by the parties, the testimony of witnesses submitted via affidavit and deposition, the record and the applicable law, the provisional settlement entered into between Julie Hardy and petitioners on October 13, 1992 is hereby SET ASIDE for the reason that the suspensive condition requiring High Court approval could not be fulfilled as hereinafter more fully explained.

1. BACKGROUND

Diver Stephen Hardy lost his life when Barge DB-29 sank in the South China Sea on August 15, 1991. He was survived by his wife, Julie Hardy and their three minor children. Stephen Hardy was also survived by his parents, Mr. and Mrs. Derek Hardy, and his first wife Anne Hardy and their two minor children.

On May 18, 1992, on the advice of her former counsel, Michael Testa and the law firm of Testa & Testa, Julie Hardy entered into a settlement agreement compromising her claims against petitioners in the instant limitation proceeding. She signed the settlement agreement "individually, as administratrix of the Succession of Stephen Hardy, as guardian/natural tutrix of the minor children Kirsty Leanne Hardy, Laura Stacey Hardy, and Ben Derek Hardy, and as personal representative of Stephen Hardy, for and in consideration of $2,900,000.00." The settlement set aside $100,000 to be placed in trust for each of the three minor children. In exchange, Julie Hardy released all legal rights arising out of or from the injuries and death of her husband. In addition, Julie Hardy agreed to indemnify the petitioners from any other claims against

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fact as to the possibility of High Court approval of the settlement, the Court finds further delay in the resolution of this matter unjustified.

the petitioners as they related to Stephen Hardy. The settlement made no mention of Stephen Hardy's first wife, his children from the first marriage, his parents, or the executor of his estate, Phillip Wilson.

On October 13, 1992, Julie Hardy and the petitioners entered into a second settlement agreement. This agreement differed from the first in that Julie Hardy appeared only on behalf of herself as the widow of Stephen Hardy and as the guardian of her minor children. Julie Hardy also indemnified petitioners from other claims with the exception of any claims that might be asserted by Hardy's parents or his first wife and the children from that marriage. Pursuant to the parties' Joint Motion for Approval of Settlement, this Court on October 13, 1992 provisionally approved that settlement pending the parties securing the approval of the High Court in the United Kingdom.[2]

The parties hotly dispute the vigor with which Julie Hardy thereafter pursued the requisite High Court approval. Petitioners assert that Julie Hardy's disillusionment with the amount and terms of the settlement led her to dismiss Testa & Testa, retain new counsel and begin efforts to sabotage the settlement. The law firm of Keaty & Keaty, Julie Hardy's present counsel of record, contend that both they and her former counsel sought in good faith to obtain High Court approval but were advised by English solicitors and barristers that approval was impossible because the settlement failed to include all of the decedent's known dependents. It is undisputed that an application for approval was never actually filed in any English court.

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[2] On February 26, 1993 the parties appeared before the Court and entered into a Stipulation clarifying certain terms of the October 13, 1992 settlement and providing for deposit into the Registry of Court of undisbursed settlement funds.

On April 21, 1993, this Court ordered the parties to show cause why the requirement of High Court approval should not be withdrawn or alternatively why the settlement should not be rescinded by order of the court. During a June 23, 1993 hearing on the rule, the Court set forth the following proposed reasons why it believed the October 13, 1992 settlement was not enforceable:

> I think I will find that the settlement agreement in this case clearly violates various protections afforded beneficiaries under English law. The settlement agreement 1) fails to provide adequate compensation for Julie Hardie's minor children after the deduction of attorney's fees; 2) purports to release the McDermott interests from claims that were not properly Julie Hardy's to release; 3) exposes Julie Hardy and her minor children to potential liabilities in the English courts. Petitioners and former counsel to Julie Hardy have always represented to this Court that the minor children in this matter were adequately compensated and their interests protected. This is clearly not the case. Had the Court been made aware of these circumstances previously, it never would have allowed the parties to pursue High Court approval of the settlement agreement.
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> Finally, the Court would note that its prior approval of the settlement agreement was provisioned upon the parties obtaining High Court approval ... [a]pparently getting this approval is impossible. Accordingly my inclination is

> to set aside the settlement and allow the parties to pursue their disputes in state court.

See Trans. of Rule to Show Cause Hearing at p.7, ln. 7-25, p.8, ln. 8-10 (In the Matter of MALMAC, No. 91-3016, June 23, 1993). In response, counsel for petitioners urged the Court to delay its ruling arguing that Julie Hardy had not sought High Court approval in good faith. The Court granted petitioner's request for further discovery. Petitioners subsequently filed a declaratory judgment action in England seeking a determination from the High Court as to whether under English law Julie Hardy could have applied for approval of the settlement. Upon being apprised of petitioner's action, this Court determined that a ruling by the High Court would aid in its disposition of the rule to show cause, and accordingly continued the rule indefinitely until such time as the High Court issued its final determination with respect to the declaratory judgment.

After hearings on the declaration, Lord Peter Pain of the High Court of Justice, Queen's Bench Division, dismissed the proceedings on the basis that the declaration sought by petitioners was too remote. In so doing, Lord Pain issued the following obiter with regard to applicable English law:

> I have no doubt that any judge faced with an application by Mrs. Julie Hardy would refuse to give his approval to any settlement which did not deal also with the children of Mrs. Anne Hardy. This view is reinforced by the fact that Mr. Lewis, the lawyer for Mrs. Ann Hardy, had indicated to Mrs. Julie Hardy's lawyers in Louisiana that his clients would intervene in English proceedings if an application were made for approval, and would oppose approval being

granted. Thus it be the case that any settlement which was finally approved by the English Court would be a settlement which took account of the Mrs. Anne Hardy family and which was a very different agreement from that for which it is suggested Mrs. Julie Hardy should apply.

In conclusion, therefore, my view is (a) that the High Court would have jurisdiction to entertain an application for approval by Mrs. Julie Hardy until after the Louisiana court had declined to set aside the agreement of 13th October 1992 and (b) that, if that happened and Mrs. Julie Hardy then made application for approval of that settlement, it would not be granted. No agreement would be approved unless it provided for the children of Anne Hardy and for such of the deceased's dependants who are sui juris that had not disclaimed. (emphasis added).

See Opinion of Lord Peter Pain at 14 (Q.B. October 21, 1994) (attached). The Court's Rule to Show Cause was subsequently reset for hearing on a joint motion by counsel for the Hardy families.

2. CONTENTIONS OF THE PARTIES

Julie Hardy's contentions regarding the unenforceability of the October 13, 1992 Receipt and Release fall broadly into two categories. First, she claims that she received inadequate representation in consenting to the settlement. Second, she argues that the Release and this Court's Order provisionally approving the settlement contain a suspensive condition of High Court approval which cannot be fulfilled because

the settlement excludes the claims of other dependents[3] of the estate in violation of English law.

Petitioners argue that the October 13, 1992 Release executed in Louisiana subjects the settlement to Louisiana law. Stipelcovich v. Sand Dollar Marine, 805 F.2d 599, 603, n.4 (5th Cir. 1986) (citing Kuswa & Associates v. Thipaut Const. Co., 463 So.2d 1264, 1266 (La. 1985)). Louisiana law affords three bases for setting aside a settlement: (1) error as to the person or the matter in dispute; (2) fraud or violence in the confection of the agreement; and (3) when the agreement is against public policy. La. C.C. arts. 1968, 3078, 3079; Brown v. Drillers, Inc., 630 So. 2d 741, 747, n.9 (La. 1994). None of these grounds are urged in the present case. Petitioners further argue that the condition of High Court approval is not "impossible" and in any case should be deemed fulfilled due to Julie Hardy's alleged bad faith. Moreover, the condition applies only to the minors' settlement and not to Julie Hardy herself. Finally, petitioners claim the legal right to unilaterally withdraw the condition.

III. ANALYSIS

Insofar as Julie Hardy alleges that her rights and obligations under the October 13, 1992 Release were not adequately explained to her, the Court notes that Mrs. Hardy was represented by counsel each step of the way. The Joint Stipulation entered in open court on February 26, 1993 clarifying the terms of the October 13, 1992 Release was signed by Julie Hardy and by her present

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[3] Consistent with the usage of the parties and in accordance with relevant English law, the Court will continue to use the term "dependents" in reference to claimants Anne Hardy, her children, and decendent's parents.

counsel of record, verifying that counsel explained to Mrs. Hardy the legal implications of the document. If the terms of the Release were unfavorable or were not adequately explained to Mrs. Hardy, her grievance lies against her counsel rather than against the settlement agreement. Bostick Foundry Co. v. Lindberg, 797 F.2d 280, 283 (6th Cir. 1986) cert. denied, 479 U.S. 1066 (1987); Taylor v. Gordon Flesch Co., Inc., 793 F.2d 858, 864 (7th Cir. 1986); Petty v. Timken Corp., 849 F.2d 130, 133 (4th Cir. 1988). Julie Hardy's complaint that she was "overreached" by her former counsel with regard to the execution of the Release thus provides no basis for overturning the settlement.

Notwithstanding the absence of error, fraud[4], violence and contra bonos mores with respect to the October 13, 1992 agreement, there remains the issue of the suspensive condition of High Court approval which the Court will now address. This Court's October 13,

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[4] Although fraud in the confection of the agreement by and between the parties does not appear to be extent, the Court remains gravely concerned about the fact that although both counsel for petitioners and counsel for Julie Hardy were evidently aware of the existence of other dependents/claimants as early as September 1992, they did not so apprise this Court on October 13, 1992, when they first appeared seeking provisional approval of the settlement. The parties' submissions omitted the divorce judgment and custody order pertaining to Anne Hardy and her children despite their assertion in paragraph 3 of the jointly submitted motion for provisional approval that "all relevant marriage, birth, death certificates" were attached, and despite the fact that copies of these documents had been exchanged by the parties prior to filing of the motion. See "McDermott/Testa Chronology of Events" Exhibit 33 (letter from Testa to counsel for petitioners).

1992 Order Provisionally Approving Settlement states that "the settlement made by Julie Hardy, individually and on behalf of her minor children...be and hereby is provisionally approved pending order by the High Court of Justice, Queen's Bench Division or other appropriate tribunal of England and Wales." The Order further provides for payment of $750,000 to July Hardy immediately, with the balance of the settlement funds to be escrowed until receipt of the requisite order from the High Court, or "to revert to petitioners should such order not be forthcoming in a reasonable time." Finally, the Order provides that July Hardy's claims against petitioners be dismissed with prejudice "upon receipt by this Court of the order of the High Court... approving the acceptance and payment of the funds...to Julie Ann Hardy, individually and in her representative capacities." See In the Matter of the Complaint of MALMAC, No. 91-3016 (E.D.La. Oct. 13, 1992) (order provisionally approving settlement).

The requirement of High Court approval contained in the October 13, 1992 Release and incorporated into this Court's Order constitutes an implied suspensive condition.[5] La. C.C. @ 1767. It follows that the settlement may not be enforced until the condition occurs. A suspensive condition that is impossible makes the obligation null. La. C.C. @ 1769.

Petitioners argue that the condition of High Court approval is not impossible because the High Court's opinion on its face shows that approval may still be obtained. Petitioners insist that the prospect of some delay does not excuse Julie Hardy from her obligations, and that at best Lord Pain's opinion simply provides that approval of the Julie Hardy settlement would be

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[5] There appears to be no dispute on this point. See Petitioners' Memorandum in Response to Rule to Show Cause, Exhibit D (letter by Professor Saul Litvinoff).

suspended until the resolution of the rights of the Anne Hardy family and decedent's parents. Petitioners point out that by virtue of a settlement recently reached, the Anne Hardy family now stands ready to join in any application for High Court approval. However, petitioner's argument overlooks the additional requirement, proposed in the parties' Joint Motion for Approval of Settlement and incorporated into this Court's October 13, 1992 Order, that High Court approval be forthcoming within a reasonable time. Considering the fact that more than two years have passed since the settlement was executed, it is plain that the requirement of approval within a reasonable time has not and cannot be met. Under Louisiana law, conditions of a contract are construed as the parties must be supposed to have understood them at the time of execution. Salles v. Stafford, Derbes, & Roy, Inc., 173 La. 361, 365, 137 So. 62, 64 (1931). It follows that contracts are not construed so as to impose absurd or unreasonable obligations on either party, and a dispute over terms must be resolved in light of the common sense principle that parties do not ordinarily so bind themselves. Settlements are generally confected with an eye to bringing litigation to a speedy and conclusive end, and the Court can find no basis for assuming that the parties contemplated that approval of the October 13, 1992 agreement and disbursement of the escrowed settlement funds would be delayed indefinitely pending resolution of the claims of all other dependents of the decedent's estate.

Petitioners argue that regardless of whether Julie Hardy could actually succeed in obtaining High Court approval within a reasonable time, Louisiana law placed her under an obligation to make a good faith attempt. Under Louisiana law, an obligor's failure to make a good faith effort to achieve fulfillment of a suspensive condition results in the condition being deemed fulfilled.

La. C.C. @ 1772. Petitioners contend that Julie Hardy's failure to actually file an application for High Court approval has produced as a matter of law the fulfillment of the suspensive condition of High Court approval.

The Court disagrees. The record reflects the efforts of Julie Hardy's present and former counsel to effectuate High Court approval.[6] In this regard, counsel

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[6] Subsequent to the signing of the May 18th Release, Testa & Testa began a course of correspondence with English solicitors Neil Irvine and Keith Enderby regarding the mechanics of obtaining High Court approval. Papers seeking the approval of the High Court were prepared by barrister Timothy Clayson.

On September 3, 1992, Irvine forwarded to Testa & Testa a copy of the opinion of John Munkman, an independent chancellor, who advised that the Anne Hardy family presented a stumbling block to obtaining High Court approval. Irvine informed Testa that "[w]e cannot proceed to obtain UK court approval without involving Ann Hardy and her children."

In June of 1993, Julie Hardy's present counsel obtained the opinion of Robert Milton Stewart, barrister and Queen's Counsel, who advised that English law provides for only one award of damages to be divided among all dependents of the deceased. In seeking High Court approval, Julie Hardy by her solicitors or counsel would be under a duty to disclose to the High Court full particulars regarding decedent's other dependents and the fact that the settlement excludes their claims. Under these circumstances, applying for approval would be improper and could result in the imposition of costs upon Julie Hardy and her counsel. Stewart's position is confirmed at least implicitly by petitioners' solicitor Thomas M. Napier who concedes that an attorney can be held responsible for excluding or otherwise prejudicing the interests of other dependents of the estate.

obtained opinions from English Counsel to the effect that an application to the High Court would be fruitless and probably improper due to the exclusion from the settlement of the executor and the other dependents of the estate. The opinions of Mrs. Hardy's English Counsel were borne out by the ruling of Lord Peter Pain quoted above to the effect that the settlement was so flawed that an application for approval could not be made. The dictates of good faith did not place Julie Hardy and her counsel under an obligation to present to the English High Court a patently flawed and potentially improper application for approval. Despite Julie Hardy's extensive inquiry at some expense into the possibility of High Court approval, the suspensive condition could not be fulfilled, rendering the settlement unenforceable.

Petitioners proffer two bases for enforcing the settlement despite failure of the suspensive condition. First, petitioners argue that the conditions of High Court approval was established solely for petitioners' own benefit and therefore under Louisiana law, petitions can unilaterally waive the condition at any time. The Court finds petitioners' argument unpersuasive. As this Court has previously observed, English law provides that a minor claimant is not bound by the terms of a settlement unless High Court approval is obtained. See Trans. of Rule to Show Cause Hearing at p.10, ln. 11-12, p.11, ln. 1-4 (In the Matter of MALMAC, No. 91-3016, June 23, 1993). See also Deitz v. Lennie Chemical Ltd., (1969) 1 AC 170, (1967) 2 All E.R. 282, HL. Failure to obtain the requisite approval would thus expose Julie Hardy to claims made by her children upon reaching the age of majority. The fact that the condition undoubtedly confers a benefit on petitioners does not preclude a similar benefit to the Julie Hardy family. Petitioners themselves admitted that the requirement of High Court approval protects both petitioners and Julie Hardy from future litigation. See Trans. of Rule to Show Cause

Hearing at 45, ln. 2-6 (In the Matter of MALMAC, No. 91-3016, June 23, 1993). Certainly petitioners may not deprive Julie Hardy of the advantages of the suspensive condition of High Court approval, which works to her benefit as well as theirs, simply because petitioners drafted the document.[7]

Second, petitioners contend that the condition of High Court approval was intended to apply only to the settlement of the minor's claims[8] and not to the settlement of Julie Hardy's claims in her individual capacity. This argument confuses the dictates of English law, not directly at issue here, with the more immediate requirements of this Court's October 13, 1992 Order provisionally approving settlement. In other words, while English law does not demand High Court

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[7] See Petitioners Supplemental Reply Memorandum at p.4, wherein it is argued that the condition was "put in the Release by petitioners."

[8] Here again petitioners contradict themselves. See Trans. of Rule to Show Cause Hearing at p.44, ln. 23-25, p.46, ln. 2-6 (In the Matter of MALMAC, No. 91-3016, June 23, 1993,) wherein the following dialogue took place on the record in open court:

> THE COURT: I know it, but you need approval to settle the Julie Hardy; you don't need any approval, you say, to settle Julie Hardy's interests? Don't you need approval for the minor children of Julie Hardy?
>
> MR. CARROLL: We certainly prefer to do that with English High Court approval because that protects McDermott, and they are paying $2.9 million. It also, in fact protects Julie Hardy. I'm also surprised that Julie Hardy does not wish to get that approval. That approval would also protect her.

approval of Julie Hardy's settlement, this Court's order does. This order states that "the settlement made by Julie Hardy individually and on behalf of her minor children...be and is hereby provisionally approved pending order of the High Court" (emphasis added). By its own terms the order rests the viability of the entire settlement upon the parties' obtaining High Court approval of the sums due the minors. The October 13, 1992 Release is less explicit[9], however Louisiana law adheres to the long-standing maxim that in construing contractual ambiguities, the Court looks to the intent of the parties as revealed by attending facts and circumstances. Henry v. Ballard & Cordell Corp., 418 So.2d 1334, 1339 (La. 1982). Of the circumstances surrounding the present matter, most telling is this Court's recollection that foreign court approval was required in the settlement of some of the other claims herein including Australian and Malaysian death cases. Moreover, ambiguities are construed adversely to petitioners as the drafters of the agreement. Lumar Marine, Inc. v. Insurance Co. of North America, 910 F.2d 1267, 1273 (5th Cir. 1990). These principles, as well as petitioners' own admissions, require the conclusion that

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[9] The October 13th Release states in pertinent part:

I, Julie Hardy individually, as widow of Stephen Hardy and as guardian/natural tutrix of the minor children...for and in consideration of the sum of TWO MILLION, NINE HUNDRED THOUSAND AND NO/100 ($2,900,000.00) U.S. DOLLARS cash in hand to me paid, which I hereby acknowledge, with SEVEN HUNDRED FIFTY THOUSAND AND NO/100 ($750,000) U.S. DOLLARS to be paid immediately to me upon execution of this release and the balance...which will be held in an interest-bearing escrow account to be distributed in accordance with an order of the High Court of Justice...as follows or as otherwise directed.

the suspensive condition of High Court approval pertains to the settlement as a whole and not to the minors' claims only. Failure of the condition thus renders the entire agreement unenforceable. Accordingly,

IT IS ORDERED that the claims of Julie Hardy, individually and for and on behalf of her three children, Kirsty Leanne Hardy, Laura Stacey Hardy, and Ben Derek Hardy are recognized as viable by the Court and the attempted settlement of all claims set forth in the subject "Receipt and Release of All Claims and Indemnity Agreement and Assignment" of October 13, 1992, is hereby SET ASIDE.

IT IS FURTHER ORDERED that no later than April 18, 1995, Julie Hardy shall return to the Clerk of Court the Seven Hundred and Fifty Thousand Dollars and no/100 ($750,000), or such other amount received, which was disbursed to her in consideration of the attempted settlement on behalf of herself and her minor children, for deposit into the Registry of the Court.[10] Failure to restore such sums as heretofore ordered will result in the Court's concluding that Julie Hardy individually and on behalf of the minor children accepts the $2,900,000 in full settlement of all her claims and the court will, after due consideration and appointment of a guardian ad litem, make the proper allocation of the

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[10] This Court's October 13, 1992 Order specifically provides that settlement funds are "to revert to petitioners should such order [of the High Court] not be forthcoming in a reasonable time." In any case, due to the application of 46 U.S.C. 688(b), Stephen Hardy was not a seaman within the purview of the Jones Act and his widow is therefore not entitled to retain settlement funds while prosecuting her claim in court. Compare Smith v. Pinell, 597 F.2d 994, 996 (5th Cir. 1979).

funds as between the claimant Julie Hardy and her minor children.[11]

New Orleans, Louisiana, this 28th day of March 1995.

s/ Judge Charles Schwartz, Jr.
UNITED STATES DISTRICT JUDGE

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[11] In the event the Court is required to make such allocation of funds it will take into consideration the total allocation of funds, the amounts on deposit in the Registry of the Court, and any sums previously disbursed to the parties and counsel.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION NO. 91-3016- A

IN THE MATTER OF THE COMPLAINT OF MALMAC SDN BHD HYDRO MARINE SERVICES, INC., STERN MARINE SERVICES, INC. AND MCDERMOTT INTERNATIONAL, INC. FOR EXONERATION FROM OR LIMITATION OF LIABILITY

February 26, 1993, Filed

JOINT STIPULATION ENTERED IN
OPEN COURT ON FEBRUARY 26, 1993

Pursuant to all proceedings in the above-entitled matter hold in Court this day, discussion of counsel and parties, argument, and stipulations by the undersigned parties, all of the claims which they have, have had, or may have regarding payment and disbursements of the $2,900,000.00 settlement funds paid to settle the claims of Julie Hardy, individually, as administratrix of the Succession of Stephen Hardy, as guardian/natural tutrix of the minor children, Kirsty Leanne Hardy, Laura Stacey Hardy, and Ben Derek Hardy, and as personal representative of Stephen Hardy, shall be disbursed as follows:

To Julie Hardy	$1,070,944.08
To Kirsty Leanne Hardy	$100,000.00 in trust
To Laura Stacey Hardy	$100,000.00 in trust
To Ben Derek Hardy	$100,000.00 in trust

plus a pro-ration of all interest accrued in accordance with the disbursement;

To Michael Testa $ 779,055.92

plus interest earned on that sum from date of deposit in the Registry of the Court.

It is further stipulated by the undersigned parties, including Michael Testa, the law firm of Testa and Testa, Julie Hardy, individually and on behalf of her minor children, Kirsty Leanne Hardy, Laura Stacey Hardy, and Ben Derek Hardy, the law firm of Keaty and Keaty in its capacity as counsel for claimant Julie Hardy, the petitioners in limitation, that is, the Malmac interests, and the law firm of Gelpi, Sullivan, Carroll & Gibbens in its capacity as counsel for petitioners, that the full sum of $2,150,000.00 plus accrued interest placed in the First Interstate Bank Texas in Houston, Texas, is to be deposited in the Registry of this Court on or before March 2, 1993, which amount is any and all settlement funds yet to be disbursed in accordance with the receipt and release signed by Julie Hardy dated October 13, 1992, a copy of which is attached hereto.

It is further agreed that the Receipt and Release of all Claims, Indemnity Agreement and Assignment dated October 13, 1992, is hereby interpreted to indicate as follows: that Julie Hardy and her children are not indemnifying petitioners against claims which have been or may be asserted by Mr. And Mrs. Derek Hardy, the parents of Stephen Hardy, and Ann Hardy, individually and/or on behalf of her children, Sara Louise Hardy and Jane Elizabeth Hardy. Petitioners in limitation are not entitled to set-off against amounts which may be awarded to the aforementioned parties in the pursuit of any valid claims they may have, any amounts previously paid to Julie Hardy in settlement in her individual capacity or in her capacity as natural tutrix an guardian of her minor children.

s/ Julie Hardy
Julie Hardy, Individually As Widow of Stephen Hardy and as Guardian and Natural Tutrix of the Minor Children Kirsty Leanne Hardy, Laura Stacey Hardy, and Ben Derek Hardy

s/Thomas S. Keaty
Thomas S. Keaty
Keaty & Keaty, On Behalf of Julie Hardy, Individually and on Behalf of her Minor Children Kirsty Leanne Hardy, Laura Stacey Hardy, and Ben Derek Hardy

s/Charles Orsburn
Charles Orsburn

s/ Michael Testa
Michael Testa

s/ Norman Mott
Norman Mott
On Behalf of Michael Testa
And the Law Firm of Testa & Testa

s/ James K. Carroll
James K. Carroll
Gelpi, Sullivan, Carroll & Gibbens
On Behalf of the Petitioners in Limitation

Thus done and entered into before me on this 26th day of February, 1993.

S/ JUDGE CHARLES SCHWARTZ, JR.
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION NO. 91-3016-A-6

IN THE MATTER OF THE COMPLAINT OF MALMAC SDN BHD, HYDRO MARINE SERVICES, INC., EASTERN MARINE SERVICES, INC. AND MCDERMOTT INTERNATIONAL, INC. FOR EXONERATION FROM OR LIMITATION OF LIABILITY

MICHAEL TESTA AND THE LAW FIRM OF TESTA AND TESTA

July 14, 1993, Filed

INTERVENOR'S COMPLAINT FILED BY TESTA

NOW COME Michael Testa and the firm of Testa & Testa ("Testa"), hereinafter called Intervenor, by and through his attorneys, and pleads the following:

1. The case is a limitation action in which the complainants are the owners, and/or operators, and/or owners pro hac vice of the construction barge DB 29 and its appurtenances.
2. Intervenor is an attorney licensed to practice law in Texas, and former counsel of record for the claimant Julie Hardy in her individual capacity and as next friend of Kirsty Leanne Hardy, Laura Stacey Hardy, and Ben Derek Hardy (hereinafter "Julie Hardy Claimants") in their claims for damages due to the death of Stephen Hardy on August 15, 1991.
3. Intervenor claims an interest in the Julie Hardy Claimants' claim relating to the transaction or occurrence that is the subject of this limitations action

by virtue of a contingency fee contract with Julie Hardy that is attached hereto and incorporated herein as though fully set forth as "Exhibit A".

4. By the terms of the contingency fee agreement, attached hereto as "Exhibit A", Intervenor is also due reimbursement from the proceeds of the claim herein made by the July Hardy Claimants for case development costs and advances.

5. Without good cause, the Julie Hardy Claimants discharged Intervenor as the attorney for Plaintiff, after the settlement of this case was reviewed and approved by the court. A copy of the discharge notice is attached hereto and incorporated herein as though fully set forth as "Exhibit B".

6. As a result of the putative settlement between the Julie Hardy Claimants and Petitioners, the sum of $2,150,000.00 is currently on deposit in the Registry of this court. Against that sum, Intervenor claims $715,950.00 in attorney's fees, plus interest, and additional sums as expenses, including $110,000.00 advance is attached as "Exhibit C" hereto.

7. Intervenor alleges his contract with Julie Hardy was entered into, as (sic) is governed by, Texas law.

WHEREFORE, premises considered, Intervenor prays that upon hearing, he have judgment for the contingency fee interest he was assigned by the Julie Hardy Claimants in the proceeds of the settlement herein, that he recover the funds he has advanced and/or expended on behalf of Intervenor herein, reasonable attorney's fees for having to bring this action, and costs.

Respectfully submitted,

s/ Norman A. Mott, III
Norman A. Mott, III, Bar Roll Number 9777
LITTLER, MENDELSON, FASTIFF, & TICHY
650 Poydras Street, Suite 2400
New Orleans, Louisiana 70130